Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1737

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS,

Petitioner,

v.

LOUIS H. AIKENS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

L. HAROLD AIKENS, JR.
1613 Crittenden Street, N.E.
Washington, D.C. 20017
(202) 635-8095/755-6545
Counsel for Respondent.

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTION PRESENTED

Whether a Postal Service employee, in order to establish a *prima facie* case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., must show more than the fact that he was black, that he continually sought promotion to higher level jobs for which he was qualified when they became available, and that the Postal Service always selected white employees for the positions.

Page

TABLE OF CONTENTS

STATEMENT 1

REASONS FOR DENYING THE PETITION 2

CONCLUSION 5

TABLE OF AUTHORITIES

Cases:

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 2, 3, 4

Texas Department of Community Affairs v. Burdine, No. 79-1764 (March 4, 1981), — U.S. —, 67 L.Ed.2d 207 (1981) 2, 3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS,

Petitioner,

v.

LOUIS H. AIKENS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix B, at 2a-8a)[1]

---

[1] All further references to Petitioner's Appendices will be noted as "App."

REASONS FOR DENYING THE PETITION

The petitioner argues that the holding of the court below in this case is inconsistent with this Court's decision in *Texas Department of Community Affairs v. Burdine*, No. 79-1764 (March 4, 1981), ____ U.S. ____, 67 L.Ed.2d 207 (1981). Petitioner, in effect, contends that *Burdine* sets new standards for the establishment of a prima facie case by the plaintiff in a Title VII case. In doing so, petitioner has attempted to eliminate the differences between a prima facie case and the ultimate burden of persuasion which must be carried by the plaintiff. *Burdine* did no such thing. In fact, the Court reiterated the elements of a prima facie case as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) when it delivered its opinion. *Texas Department of Community Affairs v. Burdine, supra* at 215, n.6. The Court stated:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a proponderance of the evidence that she applied for an available position, for which she as qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. (*Id.* at 215.)

In the accompanying footnote, the Court said:

> In the instant case, it is not seriously contested that respondent has proven a prima facie case. She showed that she was a qualified women who sought an available position * * * (*Id.* at 215, n.6).

The court below held that respondent had established a prima facie case and said (App. B, *infra*, 6a):

> Upon review of the evidence submitted to the District Court, we are convinced that Aikens offered ample evidence, which was not contested,

> to demonstrate his qualifications to perform the work in issue. To begin with, we note that the District Court made no finding that Aikens was not qualified for the positions in dispute.

In a footnote, the Court stated that:

> We should emphasize that the question here involving Aikens "qualifications," concerns only the evidence necessary to make a prima facie case. A person may be qualified to perform a job, and thus "satisfy" the requirements for a prima facie case under *McDonnell Douglas*, *supra*, and still ultimately fail on his claim of discrimination under Title VII. (*Id.* at 6a, n.3.)

Neither *McDonnell Douglas* nor *Burdine* require that the respondent show that his qualifications were equal to or better than those of the persons selected in his stead in order to establish the prima facie case. Petitioner is attempting to shift considerations which are more appropriate to the employer's rebuttal phase to the earlier requirement suggested by *McDonnell Douglas* that the employee demonstrate competence to perform the specified work. In fact, there was no question in *Burdine* as to what constituted proof of a prima facie case of discrimination under Title VII. The primary issue was "the nature of the evidentiary burden placed upon the defendant." *Texas Department of Community Affairs v. Burdine, supra*, at 213. Once the plaintiff has established a prima facie case of discrimination, the burden that shifts to the defendant is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate non-discriminatory reason. (*Id.* at 216.)

In its memorandum of November 20, the lower court clarified its opinion. (App. D, *infra*, 23a-27a). Both the majority opinion and the dissent agreed that the District Court held a full trial on the merits and that plaintiff had established a prima facie case. (*Id.* at 24a and 26a). The Court below indicated that, on remand, the District Court should make findings and draw conclusions on whether the defendant has met its burden of proof, i.e., whether the defendant has articulated some legitimate, nondiscriminatory reason for not promoting the plaintiff. If so, then the court must determine whether the plaintiff has shown that the asserted reason was a mere pretext for discrimination. (*Id.* at 25a and 26a). This is no more nor less than what is required under the holding in *Burdine.*

A review of the cases, cited by petitioner shows that there is no conflict of decisions, and petitioner's claims are spurious. All of those cases utilize the tests described in *McDonnell Douglas* as an appropriate model for a prima facie case of discrimination, even in the "promotion context." The fact that the instant case is one in the "promotion context" is not germane. Burdine was a promotion case, and this Court saw no reason to modify the basic elements of a prima facie case under Title VII as developed in *McDonnell Douglas.* The decision below does not, in any way, conflict with the decision in Burdine. Indeed, it is in full accord with principles expressed in decisions of this Court.

CONCLUSION

For the reasons set forth above the petition for certiorari should be denied.

Respectfully submitted,

L. HAROLD AIKENS, JR.
1613 Crittenden Street, N.E.
Washington, D.C. 20017
(202) 635-8095/755-6545
Counsel for Respondent.

May, 1981

see 80

1970